In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 38.

THE HOOVEN & ALLISON CO.,
An Ohio corporation,
Petitioner,

vs.

WILLIAM S. EVATT,
Tax Commissioner of Ohio,
Respondent.

REPLY BRIEF OF PETITIONER.

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INDEX.

AUTHORITIES CITED OR DISTINGUISHED.

Cases.

Texts.

Constitution.

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I.

SUMMARY OF REBUTTAL.

1. In his statement of facts, respondent states that the fibers in question were purchased *through* New York brokers who were agents for the foreign sellers. The contracts of purchase and the sales of the fibers were, therefore, admittedly between the petitioner and the foreign seller.

2. Respondent concedes that the contractual provisions providing for payment to be made on delivery on the docks at destination with title to remain in the seller until the goods were fully paid for were somewhat modified in practice and that the contract price was not paid by petitioner until ten or fifteen days after the goods arrived in Xenia. This indicates, as was testified to by petitioner's witness, that the sales were credit sales, and that the written formal contracts do not accurately reflect the agreements of the parties.

3. The respondent's claim that petitioner is not the importer, based upon the argument and assumption of

respondent that the sale of and the title to the fibers in question passed to petitioner at some unspecified point in the United States, is unsupported by the authorities and not consistent with the proper application of the law in this case. An importer may be (a) one upon whom rests the risk of loss of the goods at the time such person brings them into this country, or (b) one who has purchased the goods abroad and caused them to be brought into this country under a contract of purchase whether or not legal title is vested in him when they are so brought in. The sale of these goods took place at least as early as the moment the goods were appropriated to the contract in the foreign port. At that point some interest in the goods passed to the purchaser—the petitioner in this case. There is no requirement, within the imports clause of the Constitution, that legal title to the fibers in question must pass to the petitioner before the goods reach this country in order to constitute it the importer and thus render the goods immune from state property taxation as imports. If the location of legal title to the fibers in question be material, then the prize law cases hold that in analogous situations title to or ownership of goods passed in the foreign port of shipment to the buyer who was located in the local port. The same result should follow where other public law questions are involved.

4. The statement of respondent that the goods were not earmarked for the petitioner and were not appropriated to the contract in the foreign country is not in accord with the stipulated facts and petitioner's uncontradicted evidence.

5. The cases cited by respondent to show that in a contract to deliver goods title does not pass until delivery of the goods are distinguishable from the case at bar in that (a) they were between the parties to the contract; (b) they dealt with applications of the technical requirements of the law of sales; (c) either something remained

to be done to the goods by the seller or there were breaches of express warranties or no intention of the parties appeared to overcome the presumption that the written contract expressed their only intentions; and (d) no constitutional questions were involved.

6. The statement that the petitioner has made some use of the fibers in question by merely holding them in the original package in its raw material warehouses until such time as they would be needed in its manufacturing processes is in conflict with the decided cases.

7. Goods imported from the Philippines are imports within the meaning of that term as used in Article I, Section 10 of the United States Constitution.

II.

COMMENTS ON RESPONDENT'S STATEMENT OF FACTS.

In his brief respondent accepts the petitioner's statement of facts generally but makes certain additions thereto. In these additions the respondent states that the fibers were purchased *through* New York brokers who acted as agents for the producers in the Philippine Islands and in foreign countries. He further states that written contracts, the forms of which are contained in the Record, were signed by the petitioner "and the brokers on behalf of the producers (R. 40)." It seems now that respondent does not question the fact that the contracts to purchase the fibers were between the petitioner and the foreign sellers and that the fibers were not purchased from the New York brokers as the Supreme Court of Ohio assumed in its majority decision (R. 108).

The respondent in his statement of facts states that the terms of the contract providing for payment to be made on the delivery of the goods at destination and "title to remain in seller until goods are fully paid for" were modified somewhat in practice because the petitioner was not re-

quired to pay until ten or fifteen days after the goods finally arrived in Xenia, Ohio. No contention is made by respondent that title to the goods was in the foreign seller after the fibers were shipped from the port of entry to the petitioner at Xenia, Ohio, on a straight bill of lading. It seems to follow from the respondent's own statement of facts therefore that the modification of the written form contracts by long continued usage between the parties modified not only the requirement as to cash payment on the dock, but modified the title retention provision as well and presumably also modified the duty of delivery on the docks for these provisions seem to be inextricably interwoven.

III.

ARGUMENT.

A. Petitioner Was the Importer of the Fibers in Question.

The claim that petitioner was not the importer based upon the location of legal title is unsupported by the authorities. Respondent states (Resp. B. 11)[1] that petitioner contends that *title* to the fibers passed to it before the fibers reached the United States. Apparently he means *legal* title. Actually what this petitioner has contended is that the *sale* of the fibers took place when the goods were appropriated to the contract and shipped from the foreign port, and that beneficial title, at least, then passed to it.

Norfolk and Western Railway Company v. Sims, 191 U. S. 441 (1903) commented on in petitioner's brief, page 27, clearly supports this conclusion. The only question facing this Court in the *Sims* case was whether the sale took place in North Carolina. This Court did not decide that title did not pass until the c.o.d. charges were paid and the goods delivered and no such decision was necessary

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[1] Respondent's brief is hereafter referred to as "Resp. B." Petitioner's principal brief is hereafter referred to as "Petr. B."

to the decision of the case. Justice Brown merely said that title may not have passed till payment of the c.o.d. and freight charges by the buyer. His opinion does not indicate that he meant any more than that the mere naked legal title for security purposes was retained by the seller. As the sale occurred in Illinois some interest in the property passed to the purchaser at that moment. Petitioner maintains that at least some interest in the fibers passed to it at the latest when they were appropriated to the contract in the foreign port of shipment. Such was the intention of the parties and that is controlling. (1 *Williston, Sales* (2d ed. 1924) secs. 260, 262.)[2]

To show that petitioner is not the importer, respondent in his brief relies almost entirely upon the argument that *title* to the fibers did not pass to the petitioner until after the goods had arrived in the United States, but whether that occurred at the port of entry or at Xenia, he does not say. In this connection he apparently relies upon the fact that the fibers were sold somewhere in the United States after their arrival and therefore as a consequence of that sale title then passed to petitioner. There are several answers to this contention.

1. On page 4 of his brief respondent states that the provision of the contract relating to delivery on the docks with title remaining in the seller until the goods are fully paid for are modified in practice. If they are modified in practice with reference to the time of payment, they are necessarily modified with reference to retention of title

[2] The suit at bar is not between the parties to the contract of sale and purchase. Oral evidence in such case is clearly competent to show the real agreement between the parties, even though such evidence varies the terms of the written instrument. *Bowman v. Tax Commission of Ohio*, 135 O. S. 295, 20 N. E. (2d) 916 (1939). This is stated to be the general rule. 9 *Wigmore, Evidence* (3d ed., 1940) sec. 2446. Cf. *Livingston v. Heck*, 122 Ia. 74, 94 N. W. 1098 (1903).

for these provisions are inextricably interwoven. He apparently agrees that these are credit sales.

2. In the interpretation of the Constitution, technical diversities of the law of sales should not stand in the way of construing constitutional rights and immunities; and under *Norfolk and Western Railway Company v. Sims, supra,* it is clear that the sale took place in the foreign port of origin.

3. The respondent fails to mention *The Merrimack,* 8 Cranch, 12 U. S. 317 (1817) (Petr. B. 30) and *The Odessa* [1916] (1 A. C. 145, 154) (Petr. B. 31) which held that for prize law purposes, and therefore for public law purposes, title or ownership in the goods had passed in the foreign port to the local buyer in situations closely analogous to the case at bar.

4. As reported *Low v. Austin,* 80 U. S. 29 (1871) (discussed in Petr. B. 16) shows that the bottled wines there sought to be taxed by the State of California were shipped *on consignment* from a foreign country to Low, a commission merchant in San Francisco. This Court held the wines immune from ordinary property taxation on the ground that they were imports still in the hands of the importer. Low did not, however, have legal title, yet he was held to be the importer.[3] Respondent fails to mention this case in his brief.

5. Neither in *Waring v. City of Mobile* (Petr. B. 24) nor in *Low v. Austin, supra,* (Petr. B. 35) is there any statement that title to imported goods must pass to the taxpayer in the foreign country or before the goods reach the United States in order to make him the importer within the meaning of Article I, Section 10 of the Constitution.

Factually, the case at bar shows that in many instances the fibers in question were actually grown in the foreign

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[3] In a shipment on consignment the legal title normally remains in the consignor. *Pocahontas Guano Co. v. Smith,* 122 Va. 318, 94 S. E. 769 (1917).

countries for Hooven & Allison. It is clear from the evidence that not a single shipment of fibers would have been made from the foreign port to the United States without the pre-existing orders given by petitioner, The Hooven & Allison Co., to the foreign producers. The only party, and the party solely responsible for bringing the goods into this country is Hooven & Allison. In many cases (R. 46) it even chooses the boat line on which the goods are brought in.

Respondent states in his brief that the bales of fiber were not marked in such a way as to show them to have been appropriated to the specific contracts involved (Resp. B. 12-13). Instead, he further states that the marks indicated the type of fiber in the bale or the name of the estate upon which it was produced. From this he concludes that the contracts were executory until the fibers arrived in the United States, inspected, unloaded and weighed. This conclusion is unsound and based upon an erroneous view of the uncontradicted evidence.

The declaration itself constitutes an appropriation of the goods to the contract. In the case at bar the declarations show the approximate number of bales of fibers and the boat on which the bales are shipped (R. 40, 69). One broker stated that "when shipment is made by our principals from the Netherlands East Indies, they cable us a declaration, that is advice that shipment of such and such a contract has been made, and we in turn make formal declaration to our buyer, in this case, Hooven & Allison. This declaration actually serves to appropriate such lot of goods on the particular steamer for Hooven & Allison." (R. 77.) Another broker stated "when the declaration is made it bears a definite contract number and date and therefore serves to indicate the fulfillment of the contract in due course." (R. 82.) (To the same effect R. 72, 85, 86.) (Cf. *Produce Brokers Company, Ltd. v. Olympia Oil & Cake*

Co., Ltd., [1917] 1 K. B. 320 (Ct. of App. 1916); *Clark v. Cox, McEuen & Co.*, [1921] 1 K. B. 139 (Ct. of App. 1919).)[4]

In addition to the appropriation of the goods to the contract by the declaration the undisputed testimony of petitioner's witness shows that in practically all instances there is an actual marking of the bales to identify them with certain contracts. (R. 40, 44.) All fibers sold by Stein, Hall & Co. contain a number on each bale which corresponds with a series of numbers stipulated on the ocean bill of lading and the invoice, thereby identifying each shipment and tying it up with a respective contract. (R. 76.) The same is true of two other brokers. (R. 81, 85.) It seems clear therefore that each shipment of fibers from a foreign port is definitely appropriated to a specific contract with Hooven & Allison.

In *Westmoreland Coal Company v. Syracuse Lighting Company*, 145 N. Y. S. 420, 159 App. Div. 323 (1913) relied upon by respondent, the contract required delivery of the coal "along side Syracuse Lighting Company's dock at Syracuse, N. Y. *as heretofore*." (Italics added.) By a divided court it was held that title to the coal did not pass until such time as the canal boats were along side the defendant's dock. Apparently the majority of the court were unable to find either a course of conduct between the parties or an intention between them which would vary to any extent the written agreement. The court therefore felt that the presumption was that the title would not pass before delivery in the absence of any proof of intention to the contrary. The case is merely authority for the principle that in a suit between the parties to a contract, absent any other evidence of intention, the written words of the

[4] In the case at bar the sellers appeared to furnish this declaration not pursuant to specific requirement of the contract, but rather through long continued usage or custom of the trade. For the possible purposes of the declaration in addition to appropriating the goods to the contract see 2 *Williston, Sales* (2d ed. 1924) sec. 459a.

contract will supply the intention of the parties as to the time when title shall pass.

As pointed out previously (Petr. B. 23 *et seq.*) it does not seem material for the purpose of this case to decide when title to the fibers did pass to petitioner, but if it should become material, then it seems that at least a beneficial interest in the fibers passed to petitioner upon their appropriation to the contract in the foreign port. In addition, there is sound authority for holding that ownership or some species of title for public law purposes passed to the petitioner at the same time. (*The Merrimack, supra; Low v. Austin, supra.*) In *The Odessa*, [1916] 1 A. C. 145, 154 (Privy Council, 1915) it was held that nitrate shipped from Chile pursuant to an order from a German national in Germany but consigned to an English agent in England who paid the draft and took up the shipping documents was German property under prize law. The court said at page 154:

> "* * * Thus it has come about that in determining the national character of the thing seized the Courts in this country have taken ownership as the criterion, meaning by ownership the property or dominium as opposed to any special rights created by contracts or dealings between individuals, without considering whether these special rights are or are not, according to the municipal law applicable to the case, proprietary rights or otherwise. The rule by which ownership is taken as the criterion is not a mere rule of practice or convenience; it is not a rule of thumb. It lays down a test capable of universal application, and therefore peculiarly appropriate to questions with which a Court of Prize has to deal. It is a rule not complicated by considerations of the effect of the numerous interests which under different systems of jurisprudence may be acquired by individuals either in or in relation to chattels. All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned. * * *"

It would seem that the custom of the fiber dealers and their views of the contracts involved should weigh heavily in the Court's determination of this case. The House of Lords in England held that the English courts should follow the custom of dealers importing soya beans from the far East in construing their contracts. *Produce Brokers Company, Ltd. v. Olympia Oil and Cake Company, Ltd.* [1916] 1 A. C. 314 (House of Lords, 1915); same case on remand and rehearing, [1917] 1 K. B. 320 (Court of Appeals, 1916); in which Scrutton, *L. J.*, said at pp. 931-932:

> "* * * I think there is always a satisfaction when the Courts construe a business document in the way in which business men themselves construe it."

See also *Clark v. Cox, McEuen & Co.* [1921] 1 K. B. 139 (Court of Appeals, 1919).[5]

The respondent also relies on *Gordon v. American Tankers Corp.* 286 Mass. 349, 191 N. E. 51 (1934). In that case the question of delivery of the goods by the plaintiff was not important because the contract was single, for a

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[5] In *MacEwan, Overseas Trade and Export Practice* (London, 1938) the author in commenting on the sale of primary products in world markets says that while some goods are sold through exchanges and public auctions, such products as are incapable of standardization are sold through private sale. He further said:

> "* * * In London such products as rubber, tobaccos, copra, cocoanut oil, gums and drugs are sold almost exclusively by private treaty.
>
> "The transactions between buyers and sellers are not necessarily effected through brokers, but the bulk of the business is done that way rather than by direct contact. Though buyers and sellers dealing together through brokers are not bound down to set conditions, as in the other more highly developed marketing organizations, different trades have their own customs and in many cases standard form of contracts are in use. But, in the main, business by private sale is transacted according to the 'custom of the trade,' and in the absence of any comprehensive contract of sale disputes are settled on that basis. It is therefore necessary to study the customs of each trade in order to become fully acquainted with the basis upon which business is to be transacted."

lump sum, and title to all the goods passed or no title to any of the goods passed. The seller represented that all the goods were on the dock when in fact part of them were not. This representation was equivalent to a warranty and was breached. The goods were purchased as being on the buyer's wharf and were not there. The court stated that there was a mutual mistake of fact which was a material part and of the essence of the contract. Therefore the buyer was entitled to a rescission of the contract and the recovery back of the purchase price paid.

The balance of the cases cited on pages 14 and 15 of respondent's brief fall into six groups. Those in which the intention of the parties was clear that title should not pass until the goods were at a specific location; those in which the delivery of the goods and the payment of the purchase price were to be simultaneous acts; those in which the seller still had to do something more to the goods to prepare them for a sale; those in which there were express warranties; those in which there was a large mass of goods the specific portion of which was not appropriated to the contract; and those in which the Alabama court rigidly enforced a statute relating to the sale of fertilizer in Alabama.

It is well settled that the question as to when title passes is one of intention, even where the goods are to be delivered. "Slight evidence, however, is accepted as sufficient to show that title passes immediately on the sale, though the buyer is to make delivery." (1 *Benjamin, Sales* (Sixth American Edition, 1889) Section 325 *et seq.*)[6]

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[6] In discussing this general proposition, Professor Williston says in part: "The contract specified that one party or the other is to pay the freight. This tends to prove the intention of the parties in regard to the matter. If the buyer is to pay the freight, it is a reasonable supposition that he does so because the goods became his at the point of shipment and the carrier is his agent in transporting them." 1 *Williston, Sales* (2d ed. 1924) sec. 280 at

(*Continued on next page*)

B. The Fibers in Question had not Lost their Immunity from State Property Taxation.

Respondent argues that the petitioner made such a use of the fibers in question, while they were still stored in its raw material warehouse, as to subject them to state taxation. He also argues that they are not imported for sale and so are not imports within the constitutional meaning of that term.

To support this argument respondent relies upon *Brown v. Maryland* which involved only imports of materials for the purpose of sale. *Woodruff v. Parham*, 8 Wall. 123 (Resp. B. 16) and the cases cited by respondent on page 17 of his brief are interstate commerce cases or otherwise did not involve imports and did not require for their decision any reference to imports. The same is true of *Wynne v. Wright*, 18 N. C. 19 (Resp. B. 18). In all these cases, however, the goods involved were intended for sale and not manufacture.

In *Tres Ritos Ranch Co. v. Abbott*, 44 N. Mex. 556; 105 P. (2d) 1070 (1940) (Resp. B. 19) cattle were imported into New Mexico from old Mexico and put on a ranch where the taxpayer at once began feeding and fattening them for market. During the time they were held on the ranch, sometimes as long as two years, they gained in weight and produced many young. The taxpayer claimed the cattle immune from state property taxation on the theory that they were imports and the very large ranch, which consisted of one-half million acres of open range on which they were kept, had been upon application of the taxpayer declared to be a bonded warehouse. The court said that the

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(*Continued from preceding page*)

p. 594. In the case at bar one of the elements making up the purchase price is the normal ocean freight from the foreign port to the port of entry in the United States. Any variation in freight rates is for the buyer's account. (R. 58, 59.) Petitioner—the buyer, likewise pays the freight from the port of entry to Xenia. (R. 59, 69, 76.)

taxpayer had so used the cattle for his own purposes by feeding and fattening them, by breeding them with domestic sires, and getting them ready for market as to cause them to lose their immunity from state property taxation,—in effect the taxpayer had "processed" them. There was also a question raised as to what constituted the "original package" but such question is not before this Court in this case.

As pointed out in petitioner's brief, pages 39 *et seq.*, the case of *Gulf Fisheries Company v. MacInerny*, 276 U.S. 124 (1920) and *McGoldrick v. Gulf Oil Company*, 209 U. S. 414, 423 (1940) indicated that goods brought into the United States for processing purposes may be imports. *Mexican Petroleum Corporation of Louisiana v. Louisiana Tax Commission*, 173 La. 604; 138 So. 117 (1931) is a square holding that goods brought into this country for processing and then sale are imports within the meaning of the imports clause of the United State Constitution. Compare also *Southern Pacific Railway Company v. City of Calexico*, 288 Fed. 634 (District Court S. D. Cal., 1923). It is significant that respondent fails to mention these cases.

The statement of respondent therefore (Resp. B. 20) that "* * * when the imported goods reached the plant, they were immediately used in that they were essential to the continuous daily operation of petitioner's plant" is entirely unsupported, factually or legally. The undisputed facts show that no use whatever is made of the fibers until they are started in the process of manufacture. Merely holding the fibers in a raw material warehouse until they are started through the manufacturing process can hardly be said to be a "use" of the goods.

Nothing in the facts show that these fibers are mingled with other raw material used by the petitioner. None of the fibers in question was produced in this country. The undisputed testimony shows that the fibers in question were kept in the original bales until such time as they were

broken for processing. Assuming that they may have been placed under the same roof with other raw materials but in a different room, there would still be no commingling of the fibers with local property in such manner as to cause them to lose any immunity that they may otherwise have from state taxation. *Southern Pacific Railway Company v. City of Calexico, supra.*

C. The Fibers Brought into Ohio from the Philippine Islands were Imports within the Constitutional Meaning of that Term.

Respondent in its brief, pages 38 *et seq.*, has analyzed and commented upon all of the important cases dealing with the status of the Philippine Islands. Respondent cites and relies upon *Dant & Russell v. Board of Supervisors*, 21 Cal. (2d) 534, 133 P. (2d) 817, cert. den. 320 U. S. 735 (1943). In its decision of that case the Supreme Court of California relied heavily upon the *Insular* cases and the *Fourteen Diamond Rings* case. We shall not repeat here our analysis and discussion of those cases as appears in our principal brief. It is submitted, however, that the case of *Dant & Russell* is incorrectly decided and is no precedent for this Court to follow.

It is submitted therefore that the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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